Twenty-fifth

Willem C. Vis International Commercial Arbitration Moot

Memorandum for Claimant

Delicatesy Whole Foods Sp v. Comestibles Finos Ltd

On behalf of	**Against**
Delicatesy Whole Foods Sp	Comestibles Finos Ltd.
39 Marie-Antoine Carême Avenue	75 Martha Stewart Drive
Oceanside	Capital City
Equatoriana	Mediterraneo
CLAIMANT	RESPONDENT

Albert DAKAR – Fidelle KAMEL – Ingrid Mary GHANEM

Marina IBRAHIM – Rosabelle SABA – Stephanie BOU CHALHOUB

Holy Spirit University of Kaslik

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TABLE OF ABBREVIATIONS

Art.	Article
Exh. C/R	Exhibit for CLAIMANT/RESPONDENT
Expl.	Explanation
CISG	United Nations Convention on Contracts for the International Sales of Goods
GS	General Standard
Intro	Introduction
i.e.	id est (that is)
IBA	International Bar Association
ICC	International Chamber of Commerce
Inc.	Incorporation
Ltd	Limited
No.	Number
NoA	Notice of Arbitration
NoC	Notice of Challenge
OLG	Oberlandesgericht (German Regional Court of Appeals)
p. /pp.	Page/Pages
para. /paras.	Paragraph/Paragraphs
PCA	Permanent Court of Arbitration
Po	Procedural Order
Pnt.	point
RNoA	Response to the Notice of Arbitration
SFT	Swiss Federal Tribunal
SoC	Statement of Claim
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
USD	United States Dollar(s)
v.	Against (versus)

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The Record	The 25th Annual Willem C. Vis International Arbitration Moot Problem Cited in paras. 16,19,58,63,64,66
Working Group Report 1	UNCITRAL 4th Working Group Report, A/CN.9/245 Cited in para. 34
Working Group Report 2	UNCITRAL 5thWorking Group Report, A/CN.9/246 Cited in para.34

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Austria

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France

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Germany

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OLG Stuttgart 2008	Lativian Plaintiff t v. German Defendant Oberlandesgerich Stuttgart (Appellate Court) 31 March 2008 Case No 6 U 220/07 Cited in para. 101
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Bundesgerichtshof 2014	Belgian Plaintiff v. German Defendant Bundesgerichtshof 28 May 2014 Case No VIII ZR 410/12 Cited in para. 101
Yarn Case	Swiss Plaintiff v. German Defendant Appellate Court Frankfurt 30 August 2000 Case No. 9U 13/00 Cited in para.26
Chinese Goods Case	Hong Kong Claimant v. German Respondent Schiedsgericht der Handelskammer Hamburg 21 March 1996 Cited in para.112
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US Court of Appeals 1978	Compare Andros Compania Martima, S.A. v. Marc Rich and CO United States Court of Appeal Second Circuit 7 June 1978 N.865, Docket 78-7019 Cited in Para.60

US Court of Appeals 1982	Middlesex Mutual Inc. CO v. Levine United States Court of Appeal Eleventh Circuit 10 May 1982 No. 80-5630 Cited in para. 68

INDEX OF LEGAL TEXTS

Cited as	Full Citation
UNCITRAL Rules	UNCITRAL Arbitration Rule (as revised in 2010)
CISG	United Nations Convention on Contracts for International Sales of Goods 1980
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration 1985 with 2006 amendments
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts 2010
IBA Guidelines	IBA Guidelines on Conflicts of Interest in International Arbitration 2014
IBA Rules	IBA Rules of Ethics for International Arbitrators 1987

STATEMENT OF FACTS

1. The parties to these arbitration proceedings are Delicatesy Whole Foods Sp ("CLAIMANT") and Comestibles Finos Ltd ("RESPONDENT). CLAIMANT is a medium sized manufacturer of fine bakery products registered in Equatoriana. RESPONDENT is a gourmet supermarket chain registered in Mediterraneo (collectively referred to as the "Parties").

2. In March 2014, during the yearly Danubian food fair in Cucina, CLAIMANT was approached by RESPONDENT, where they discussed product choices, delivered quantities and the costs and benefits of sustainable production. On 10 March 2014, CLAIMANT received from RESPONDENT an invitation to tender and tender documents (the "Tender Documents") for the delivery of chocolate cakes.

3. On 27 March 2014, CLAIMANT submitted its sales offer, which included changes in the specification of the chocolate cakes and the mode of payment ("CLAIMANT's Offer"). It further stated that CLAIMANT's Offer is subject to its own general conditions of sale ("CLAIMANT's GC") that are published on its website. On 7 April 2014, RESPONDENT expressly accepted CLAIMANT's Offer, notwithstanding the changes it contained (the "Contract").

4. Accordingly, on 1 May 2014, CLAIMANT delivered the first set of 20 000 of the Queens' Delight Cakes and proceeded with deliveries of the same throughout 2014, 2015 and 2016.

5. On 19 January 2017, a special rapporteur from the United Nations Environment Program issued a report on widespread fraud and corruption in Ruritania ("UNEP Report"). On 27 January 2017and following the UNEP Report, RESPONDENT requested CLAIMANT to confirm, by the next day, that all its suppliers strictly adhere to Global Compact Principles ("GCP") and noted that RESPONDENT would no longer accept any delivery nor make any further payments, until this issue is solved.

6. On the same day, CLAIMANT asserted that whilst the cocoa used in the chocolate cakes is provided by Ruritania Peoples Cocoa mbH ("RPC"), the latter complied with the

principles of sustainable production. CLAIMANT also declared that it will verify whether RPC are involved in the fraud whilst it insisted that RESPONDENT should nonetheless pay for the cakes already delivered irrespective of RPC's status.

7. On 10 February 2017, CLAIMANT informed RESPONDENT that RPC was involved in the Ruritania scandal and thus immediately terminated its contract with it. CLAIMANT also offered a reduction on the price of the delivered and still unpaid 600 000 cakes. On 12 February 2017, despite CLAIMANT's offer, RESPONDENT terminated the Contract on the pretext that the RPC's cocoa production was not in compliance with its sustainability standards. On 30 May 2017, the Parties unsuccessfully attempted to amicably settle the dispute through mediation.

8. On 30 June 2017, CLAIMANT submitted a notice of arbitration (the "NoA") against RESPONDENT under the UNCITRAL Rules as per the Contract and nominated Mr. Rodrigo Prasad as its arbitrator. It also enclosed Mr. Prasad's declaration of impartiality and independence, which contained several disclosures (the "Declaration of Independence"). On 31 July 2017, RESPONDENT submitted its Response to the Notice of Arbitration ("RNoA"), in which it agreed to Mr. Prasad's appointment and appointed Ms. Hertha Reitbauer as its arbitrator. On 22 August 2017, Professor Caroline Rizzo was jointly appointed as presiding arbitrator by the party-appointed arbitrators.

9. On 29 August 2017, RESPONDENT requested the Tribunal to order CLAIMANT to disclose whether CLAIMANT is funded by a third-party. On 7 September 2017, CLAIMANT declared that its claim is funded by Funding 12 Ltd ("Funding 12"), a subsidiary of Findfunds LP ("Findfunds"). On 11 September 2017, Mr. Prasad disclosed that it had acted in previous arbitrations, which were funded by other subsidiaries of Findfunds.

10. On 14 September 2017, RESPONDENT sent its notice of challenge ("NoC") against Mr. Prasad based on his above disclosures, requesting Mr. Prasad's withdrawal. On 29 September 2017, CLAIMANT submitted its response to the notice of challenge ("RNoC") and requested that the challenge be referred to an appointing authority under Art. 13 (4) of the UNCITRAL Rules.

INTRODUCTION

11. RESPONDENT and CLAIMANT have successfully done business for several years. During those years, CLAIMANT dutifully delivered first-rate chocolate cakes to RESPONDENT. This long-standing business relationship was suddenly interrupted and terminated by RESPONDENT, who abruptly informed CLAIMANT that it was canceling the contract and stopping payment for unsubstantiated and debatable reasons.

12. CLAIMANT unsuccessfully tried to find a mutual beneficial solution by contracting with new cocoa bean producers in an attempt to show its good faith and sincere wish to continue the business relationship. However, despite its optimism, CLAIMANT failed to convince RESPONDENT that its cakes were and continue to be a first-rate product on the market.

13. Seeing no other solution, CLAIMANT initiated these arbitration proceedings on 30 June 2017. Unfortunately, even this part of the process proved difficult. RESPONDENT has challenged CLAIMANT's arbitrator, Mr. Prasad, contesting his impartiality, placing unnecessary hurdles to impair an already strained relationship.

14. CLAIMANT asks the arbitral tribunal to first, rule that the challenge against Mr. Prasad be decided by the appointing authority under the UNCITRAL Rules, or alternatively that the full tribunal decides on the challenge under Danubian Law (I). Second, to rule that RESPONDENT has failed to show justifiable doubts as to Mr. Prasad's impartiality and independence, and his removal is thus unwarranted (II). Finally, to rule that CLAIMANT fulfilled its obligation to deliver conforming goods under the Contract (III), and in the unlikely event that the goods are found to be nonconforming, CLAIMANT is still entitled to be paid for the goods delivered under the CISG and the Contract (IV).

ARGUMENTS

PART 1: THE CHALLENGE AGAINST MR. PRASAD SHOULD BE DECIDED BY THE APPOINTING AUTHORITY UNDER THE UNCITRAL RULES, AND ALTERNATIVELY BY THE FULL TRIBUNAL UNDER DANUBIAN LAW

15. RESPONDENT submitted a challenge against Mr. Prasad and requested that the Tribunal rules on it without the participation of Mr. Prasad [NoC, p. 37]. However, under Art. 13 of the UNCITRAL Rules, the Tribunal does not have authority to rule on the challenge, which should be decided by an appointing authority to be agreed by the Parties (I). Alternatively, the Tribunal should rule on the challenge with the participation of Mr. Prasad in accordance with Art. 13 of the Danubian arbitration law (II).

I. The Arbitral Tribunal does not have the authority to rule on the challenge, which should be decided by an appointing authority under Art. 13 of the UNCITRAL Rules

16. RESPONDENT submitted its challenge to the Tribunal under the Danubian Law on the pretext that the Parties have excluded in their arbitration clause [NoA, p.6, para.13] "The Arbitration Clause" the intervention of an institution under Art. 13 of the UNCITRAL Rules [The Record, p. 6, para. 13]. However, the Parties' intention behind the wording of the Arbitration Clause was to exclude institutional arbitration and to confirm the ad hoc character of the proceedings (A). Assuming that the Parties' intention was to exclude the appointing authority, such exclusion would only be limited to the appointment process of and not the challenge procedure of Art. 13 (4) of the UNCITRAL Rules (B).

A. The Parties' intention behind the Arbitration Clause was to exclude institutional arbitration and not the appointing authority of the UNCITRAL Rules

17. The Arbitration Clause provides that arbitration shall be conducted under the UNCITRAL Rules and that the place of arbitration shall be Vindobona in Danubia *i.e.* that the Danubian arbitration law shall apply as *lex loci arbitri*. Danubia has adopted the UNCITRAL Model Law on international commercial arbitration with the 2006 amendments ["Danubian Law"] [PO1, p.49, para.4].

18. However, Art.1 (3) of the UNCITRAL Rules gives precedence for the UNCITRAL Rules over the provisions of any national law, save where these provisions are mandatory. RESPONDENT relies on Art. 13 of the Danubian Law to give authority to the Tribunal to rule on the challenge. However, Art. 13 (1) of the Danubian Law expressly gives the Parties the right to derogate therefrom. It follows that this provision is not mandatory and is superseded by the UNCITRAL Rules. In this respect, Art. 13 (4) of the UNCITRAL Rules gives the authority to rule on challenges against arbitrators to an appointing authority to be designated by agreement of the Parties or failing which by the Secretary General of the PCA. RESPONDENT argued that challenge procedure of Art. 13 (4) of the UNCITRAL was excluded by the Parties in the arbitration clause, which states as follows: *"Any dispute, controversy or claim arising out of or relating to this Contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules* ***without the involvement of any arbitral institution***[…]*."* [Emphasis added]

19. RESPONDENT alleges that the expression *"without the involvement of any arbitral institution"* was intended to exclude recourse to the appointing authority of Art. 13(4) of the UNCITRAL Rules [The Record, p. 39, para.8]. However, a plain reading of the Arbitration Clause shows that the Parties' intention out of this inclusion was to confirm the ad hoc character of the arbitration and to exclude institutional arbitration. This understanding stems clearly from RESPONDENT's own wording where it explained to CLAIMANT that *"In light of your experiences with* ***ad hoc arbitration****, I have contacted our legal department to ascertain whether our new arbitration clause* ***excluding institutional arbitration*** *is really practicable."* [Emphasis added] [Exh. C-1, p. 8]. In her witness testimony, Ms. Ming reiterated that RESPONDENT intention behind this wording was to adopt ad hoc arbitration and to exclude institutional arbitration. She asserted: *"we switched our arbitration clause from an* ***institutional arbitration*** *clause for an* ***ad hoc clause*** *providing for arbitration under the UNCITRAL Rules."* [Emphasis added] [Exh. R-5, p. 41, para.5] Ms. Ming even confirmed CLAIMANT's understanding that the exclusion at hand only related to institutional arbitration. She stated that: *"Mr. Tsai [CLAIMANT's Head of Production] was very interested in the affair since CLAIMANT*

was in the process of reviewing its own contract models. […] He told that they had moved some years before the other way from ***ad hoc arbitration*** *to* ***institutional arbitration*** […]." [Emphasis added] [Exh. R-5, p. 41, para.5]

20. An interpretation of the Parties' intention out of this inclusion would lead to the same. In fact, interpretation should be made as per the requirements of Art. 8 of the CISG, which the Parties expressly agreed to apply to their arbitration agreement [PO.1, p. 48, para. 1].

21. Art. 8 CISG states as follows: *"for the purposes of this Convention, statements made by and other conduct of* ***a party are to be interpreted according to his intent where the other party knew*** *or could not have been unaware what that intent was."* [Emphasis added]. In fact, the Arbitration Clause was drafted by RESPONDENT and included in the Tender Documents. On several occasions, RESPONDENT revealed its concerns as to the conduct of the arbitration under the auspices of an institution. Such concerns were reflected in RESPONDENT insertion of the abovementioned expression in order to emphasize on the *ad hoc* character of the arbitration proceedings, already implied by reference to the UNCITRAL Rules. Such intention further confirms RESPONDENT's intention to conduct arbitration under the UNCITRAL Rules and not by institutional arbitration.

22. Moreover, assuming that, as alleged by RESPONDENT, the expression was intended to exclude the intervention of any institution and not only to confirm the ad hoc character of the arbitration, such interpretation would still *not* preclude the recourse to the appointing authority of the UNCITRAL Rules. In fact, RESPONDENT asserted that it *"wanted as few persons as possible to know about the arbitration and had no confidence that a dispute would be kept confidential by* ***any institution.****"* [Emphasis added] [NoC, p. 39, para.8] It also alleged that its intention was to explicitly *"exclude the involvement of* ***any arbitral institution.****"* [Emphasis added] [Exh. R-5, p. 41, para.5] However, the appointing authority under Art. 13 of the UNCITRAL Rules is *not* and does not need to be an arbitral institution.

23. In fact, Art.6 (1) of the UNCITRAL Rules provides as follows: *"Unless the parties have already agreed on the choice of an appointing authority, a party may at any time propose*

the name or names of one or more institutions ***or persons****, including the Secretary-General of the Permanent Court of Arbitration at The Hague, […],* ***one of whom would serve as appointing authority.****"* It follows that the parties agree on any person or authorities to act as appointing authority for the purpose of the UNCITRAL Rules. Art. 6 does not impose on the Parties to designate an arbitral institution as appointing authority but merely gives them the possibility to do so, among other choices.

24. Hence, RESPONDENT's intention to exclude the involvement of any institution does not entail exclusion of the recourse to an appointing authority under the UNCITRAL Rules. It simply excludes the possibility to appoint arbitral institutions as appointing authority under the UNCITRAL Rules. Even if no agreement as to the appointing authority is reached between the Parties, Art. 6 would refer such dispute to the Secretary-General of the PCA, who is not an arbitral institution within the meaning intended by the Arbitration Clause, and whose role is limited to designating the appointing authority. Hence, even in this unlikely event, there is no involvement of an arbitral institution for the ruling on the challenge against Mr. Prasad.

25. However, and even if, as alleged by RESPONDENT, RESPONDENT intention was to exclude referral to an appointing authority, such exclusion is limited, as reflected by RESPONDENT during the negotiations period, on the procedure relating to the *composition* of the Tribunal and not to the *challenge* thereof. An interpretation under the CISG confirms such intention.

B. Even if RESPONDENT's intention was to exclude the appointing authority, such exclusion would, as interpreted under Art. 8 of the CISG, be limited to the composition of the Tribunal and not to the challenge thereof

26. RESPONDENT alleges that an exclusion of the involvement of any institution would entail the reference to an appointing authority under Art. 13 (4) of the UNCITRAL Rules for the challenge of arbitrators. [NoC, p.39, para.8]However, assuming that such exclusion was intended to include the appointing authority, an interpretation of the Parties' intentent under Art. 8 of the CISG, applicable to the Arbitration Clause by virtue of the Parties' agreement [P.O.1, p.48, para 1(2)] would reveal that such exclusion is limited to the appointment procedure and not to the challenge procedure of arbitrators.

In fact, Art. 8 (1) of the CISG provides that statements made by a party should be interpreted *"according to his intent where the other party knew or could not have been unaware what that intent was."* In determining such intent, Art. 8 (3) requires that *"due consideration is to be given to all relevant circumstance of the case, including the negotiations* […]." [CISG Digest p.57, para.21]. Courts have resorted to negotiations and previous conduct in order to interpret the Parties' intentions behind an agreement [Yarn Case; Mono Amino Phosphate Case].

27. In the case at hand, RESPONDENT, as the party having suggested the Arbitration Clause, clearly explained during the negotiations phase that the exclusion of institutional involvement is limited to issues dealing with the constitution of the Tribunal. RESPONDENT explained when discussing the Arbitration Clause as follows: *"Apparently, we have never had any problems concerning* ***the composition of arbitral tribunals*** *and our legal department was confident that the existing arbitration clause would not cause any problems in its application in practice."* [Emphasis added] [Exh. C-1, p.8, para.5]. Such was also CLAIMANT's understanding as reflected in its reply to RESPONDENT's abovementioned statement where it asserted that: *"In the unlikely event that a dispute arises and cannot be resolved amicably, we are certain that we will be able to overcome any problems relating to the* ***constitution*** *of the arbitral tribunal even without institutional support."* [Emphasis added] [Exh. C-3, p. 15, para.4]

28. CLAIMANT never intended to deviate from the challenge procedure mentioned in Art.13 (4) UNCITRAL Rules when it agreed to the addition in the arbitral clause of the provision that excludes the intervention of any arbitral institution. Moreover, all negotiations prior to the conclusion of the contract never came across any issues relating to the challenge of arbitrators and were solely focused on the issue of the Tribunal's appointment. Consequently, should the Tribunal find that the Parties' intent behind the Arbitration Clause was to exclude the intervention of the appointing authority, the Tribunal is respectfully requested to limit such exclusion should to the appointment procedure and declare the challenge procedure of Art. 13 (4) to be applicable.

29. In light of the above, CLAIMANT respectfully requests the Tribunal to decline

jurisdiction to rule on the challenge and to refer the matter to an appointing authority under the UNCITRAL Rules. Subsequently, CLAIMANT invites RESPONDENT to discuss the designation of an appointing authority to rule on the challenge as required under Art. 6 of the UNCITRAL Rules. In designating the appointing authority, CLAIMANT is willing to take into consideration RESPONDENT's confidentiality concerns so that a person of trust to both Parties is designated.

30. Nonetheless, should the Tribunal find that the Arbitration Clause excludes the challenge procedure of Art. 13 (4) of the UNCITRAL Rules, the Tribunal should then rule on the challenge with the participation of Mr. Prasad as per the provisions of Art. 13 of the Danubian Law.

II. Alternatively, Article 13 of Danubian Law authorizes Mr. Prasad to participate in the Tribunal's ruling on the challenge.

31. Should the tribunal find that it is the competent authority to decide on the challenge, such decision must be taken by the Tribunal with its full members. RESPONDENT's claim that a challenge should exclude Mr. Prasad is legally baseless in light of the clear wording of Art. 13 of the Danubian Law and the drafting history of the UNCITRAL Model Law (A). In any case, a ruling by a two-member Tribunal would violate the Parties' agreement for a three-member tribunal (B).

A. Article 13 of the Danubian Law requires the entire Tribunal to rule on any challenge against one of its members.

32. At first, the Arbitration Clause provides for a three-member Tribunal to resolve disputes between the Parties. Authorizing the Tribunal to rule on the challenge as a two-member tribunal, as requested by RESPONDENT, would be in clear contravention the Parties' express agreement [Born, p.776, para.20].

33. If the Tribunal deems the challenge procedure of Art. 13 of the UNCITRAL Rules to be inapplicable, the challenge should be decided according to Art. 13(2) of the Danubian Law which provides that *"the arbitral tribunal shall rule on the challenge."* In reliance on the above, CLAIMANT requests the Tribunal to apply Art. 13 of the Danubian Law which grants the current arbitral tribunal, with the inclusion of Mr. Prasad, the authority to rule on the challenge request. Art. 13 of the Danubian Law does not

preclude the challenged arbitrator from ruling on his challenge. Such exclusion should have been expressly contemplated as an exception to the full tribunal.

34. The UNCITRAL Working Groups Reports confirm the participation of the challenged arbitrator in the tribunal that would rule on his challenge. [Working Group Report 1, p.419, para.207; Working Group Report 2, p.421, para.38]. Similarly, Art. 13(3) of Danubian Law authorizes the current tribunal to pursue the present arbitration even if a court application related to the challenge is pending.

35. Consequently, RESPONDENT's claim that Mr. Prasad would "be a judge in his own cause" [NoC, para.8] is therefore misplaced and unsubstantiated.

B. In any case, a ruling by a two-member tribunal violates the Parties' agreement for an arbitration before a three-member tribunal

36. Respondent is seeking a decision on the challenge against Mr. Prasad from the other two remaining arbitrators, which means that it is seeking a decision from an incomplete tribunal.

37. In this respect, CLAIMANT points out that there is no provision in the UNCITRAL Rules or the Danubian Law that would allow an incomplete tribunal to render a valid decision on any matter, including an arbitrator's challenge. In addition, the drafting history of the UNCITRAL Rules gives no indication that the drafters gave any contemplation to the idea of authorizing an incomplete tribunal to function.

38. Furthermore, the Arbitration Clause expressly provides for a three-member tribunal. Therefore, a decision made by a two member tribunal which contradicts the Parties' agreement is invalid and un-enforceable [Paris Court of Appeal 1997]. A similar rationale was adopted by the Swiss Federal Tribunal [SFT 30 April 1991].

39. Consequently, the Tribunal cannot rule on the challenge as a two-member tribunal and must ensure Mr. Prasad's participation in order to render a valid decision on the challenge in accordance with Art. 34 (2) (a) of the Danubian Law [Gary Born, p.1960; Lew & Mistelis, pp.322-323]. In light of the above, CLAIMANT requests the full Tribunal to rule on the challenge of Mr. Prasad.

PART 2: RESPONDENT'S FAILURE TO PROVE JUSTIFIABLE DOUBTS AS TO MR. PRASAD'S IMPARTIALITY AND INDEPENDENCE DOES NOT WARRANT HIS REMOVAL

40. The applicable UNCITRAL Rules set out a very high threshold to disqualify an arbitrator (I) which RESPONDENT failed to establish against Mr. Prasad (II).

I. The applicable rules require a high and objective threshold for disqualification of arbitrators

41. Unlike what RESPONDENT is alleging, the standard that should apply to challenge Mr. Prasad's impartiality and independence is the one provided in Art. 12 of the UNCITRAL Rules and to which the Parties expressly agreed (A) and not the IBA Guidelines, which are not applicable in these proceedings (B). However, even if the IBA Guidelines are applicable, RESPONDENT still fails to prove that the standard of disqualification under these Guidelines is met with respect to Mr. Prasad (C).

A. The objective standard for disqualification under the UNCITRAL Rules requires the existence of justifiable doubts as to Mr. Prasad's impartiality and independence from a third person's perspective.

42. Art. 12 of the UNCITRAL Rules provides that *"Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence."* Art. 12 expressly requires the challenging party to prove that the alleged circumstances give actual justifiable doubts as to an arbitrator's impartiality and independence for a challenge to be successful. Whilst the UNCITRAL Rules do not give a definition for the standard of justifiable doubts, courts dealing with the matter under UNCITRAL Rules have held that actual and certain doubts must be established, while a likelihood of justifiable doubts or an appearance of bias is not sufficient to meet the standard of justifiable doubts under Art. 12 of the UNCITRAL Rules. Hence, a party challenging an arbitrator "has to furnish adequate and solid grounds for its doubts" [Born, p. 736].

43. Therefore, and unlike what RESPONDENT is alleging [NoC, p. 39, para. 10], the standard of justifiable doubts under the UNCITRAL Rules is an objective standard in the eyes of a third party, and not in the eyes of the applicant or the parties to the proceedings *i.e*. if a reasonable and informed third party would reach the conclusion that the arbitrator may

be influenced by factors other than the merits of the case. Such objective test should always prevail over the subjective test when assessing the justifiable doubts standard [Gómez-Acebo, p. 123, paras. 5-6]. Furthermore, *"courts have held the bias must be direct, definite and capable of reasonable documentation, rather than remote or speculating."* [US Court of Appeal 2000]. Moreover, the test of justifiable doubts is met when *"their existence can be verified without any need to speculate about the arbitrator's actual state of mind or about the meaning of his conduct in the reference. The mere existence of these links does not question the arbitrator's integrity."* [Gómez-Acebo, chapter 4, paras. 4-35]. RESPONDENT failed to establish that any of the alleged links have had any bearing on Mr. Prasad's impartiality or independence, let alone are of the nature to create justifiable doubts.

44. On the other hand, a party's failure to disclose circumstances relating to an arbitrator's independence does not alone constitute circumstances that would give rise to justifiable doubts as to an arbitrator's impartiality. In any event, neither the UNCITRAL Rules nor the Danubian Law require parties to disclose third-party funding, It has confirmed that *"Parties to an international commercial arbitration are under no procedural duty to disclose the fact that they are being funded*." [De Brabandere & Le Petak].

B. The IBA Guidelines are not applicable to these proceedings

45. While RESPONDENT heavily relied on the IBA Guidelines in support of its challenge against Mr. Prasad, the IBA Guidelines are as their name indicates, mere guidelines that are not applicable to the arbitration proceedings unless expressly chosen by the Parties, which is not the case in the matter at hand. As previously mentioned, the law applicable to any procedural matters, including an arbitrator's challenge is that agreed upon by the Parties, in this instance, the UNCITRAL Rules. At no time, did the Parties agree to apply the IBA Guidelines to these proceedings.

46. In fact, the IBA Guidelines set out the scope of their application and expressly exclude their binding character where the Parties have not expressly agreed thereon. The IBA Preamble expressly provides that the *"Guidelines are not legal provisions and do not override any applicable national law or arbitral rules chosen by the parties*" [IBA Guidelines, intro. Pnt.6; Ramon Mullerat OBE, p. 3, para. 4]. Therefore, they are

applicable and binding only when parties expressly so state [IBA Rules, introductory note].

47. As the Parties have agreed that the UNCITRAL Rules should govern the current proceedings without any reference to the IBA Guidelines, the UNCITRAL Rules should apply when assessing the standard for the challenge of arbitrators. Therefore, national courts have declined the application of the IBA Guidelines to arbitration where the arbitration clause did not refer to it. Hence, even though the circumstances of the case fall under the non-waivable red list of the IBA Guidelines, the English High Court declined their application and dismissed the challenge under the English Arbitration Act on the basis that the IBA Guidelines *"do not have the force of law and the court will not apply them mechanically."* [Queen's Bench Division 2016].

48. Consequently, the Tribunal is respectfully requested to decline the application of the IBA Guidelines and to dismiss RESPONDENT's allegations based on their provisions. Notwithstanding the above, even if the IBA Guidelines were to apply, the circumstances alleged by RESPONDENT still fail to meet the standards required thereby for the challenge of arbitrators.

C. Assuming the IBA Guidelines are applicable, the threshold for the disqualification of Mr. Prasad is not met under these Guidelines

49. Contrary to RESPONDENT's allegations, the IBA Guidelines, should they apply, would still not lead to disqualifying Mr. Prasad. The Guideline equally adopt a high threshold for justifiable doubt, assessed in the eyes of a reasonable third person. The IBA Guidelines define justifiable doubts as follows: *"Doubts are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision."* [IBA, General Standard 2 (c)]

50. It follows that RESPONDENT's request for the Tribunal to take into account whether Mr. Prasad's conduct constitutes justifiable doubts "*in the eyes of RESPONDENT*" should be dismissed [NoC, p. 39 para.10]. It also means that only circumstances which would lead a third party to have doubts as to the arbitrators' capacity to rule on the dispute

without being influenced by external factors should be retained as justifiable. In this respect, the IBA Guidelines set out the situations where a justifiable doubt necessarily exists: these situations are enumerated under the Non-Waivable Red List (the "Non-Waivable Red List") [IBA, p.20, sect. 1]. RESPONDENT did not, at any time, refer to the Non-Waivable Red List in its challenge. In any case, none of the situations of the Non-Waivable List include the circumstances indicated by RESPONDENT.

51. Furthermore, the IBA Guidelines also enumerate under the Waivable Red-List, the situations that are less serious but which would still create justifiable doubts (the "Waivable Red List") [IBA, p.17, para 2]. Again, RESPONDENT failed to establish that any of the circumstances it alleges fall under this List. In any case, Claimant denies, as will be established below, that any of these circumstances are within the Non- Waivable or the Waivable Red List (together the "Red Lists").

52. The IBA Guidelines' Orange List (the "Orange List") provides for circumstances which *"depending on the facts of a given case, may in the eyes of the parties give rise to doubts as to the arbitrator's impartiality or independence."*[IBA, p.18, para.3] It follows that circumstances falling under the Orange List do not necessarily create any doubts, let alone justifiable doubts. They merely relate to the arbitrator's duty to disclose any circumstances that may raise doubts as to his impartiality. This rests on *"the principle that the parties have an interest in being fully informed of any facts or circumstances that may be relevant in their view."* [IBA, Expl. GS 3 (a)] However, such disclosure does *"not imply the existence of a conflict of interest."* On the contrary, according to these Guidelines, an arbitrator who has made a disclosure to the parties considers himself or herself to be impartial and independent of the parties. [IBA, Expl. GS 3 (a)] The IBA Guidelines put the burden upon the challenging party to prove, when a fact is disclosed, whether it meets the objective test provided for under the GS 2. Thus and as will be seen below, the disclosures made by Mr. Prasad further corroborate more its impartiality. Finally, the IBA Guidelines Green List (the "Green List") describes circumstances that, from an objective point of view, neither constitute a conflict of interest nor impose on the arbitrator a duty of disclosure.

53. As will be seen below, all the circumstances raised by RESPONDENT do not meet the

objective threshold of justifiable doubts required under the UNCITRAL Rules nor do they constitute events falling under the Red or even the Orange List of the IBA Guidelines.

II. RESPONDENT's arguments do not meet the objective justifiable doubts test and the challenge should therefore be dismissed

54. Not a single claim raised by RESPONDENT meets the justifiable doubts standard either under the applicable UNCITRAL Rules or under the IBA Guidelines. Hence, Mr. Prasad's previously expressed opinion (A), his repeat appointments (B) and the existence of third-party funding in previous arbitrations arbitrated by Mr. Prasad (C) do not constitute justifiable doubts as to Mr. Prasad's impartiality and independence and are thus insufficient to warrant a challenge against him.

A. Mr. Prasad's scholarly article fails to meet the threshold of disqualification

55. RESPONDENT considers that Mr. Prasad is not a "suitable" arbitrator because he "positions himself very clearly" in favor of CLAIMANT. [NoC, p. 38, para. 5] However, Mr. Prasad's published article does not constitute a justifiable doubt as to his impartiality and independence. As explained above, in order for doubts to be justifiable, they should be definite and not speculative. RESPONDENT is speculating the arbitrator's impartiality and did not explain how Mr. Prasad's opinion could affect his conduct in the arbitration. Even more, it is common for arbitrators to change positions and expressed opinions with regards to the facts of each case as is the case of Professor Albert Van Den berg who had a previous opinion rejecting the necessity argument in Enron v. Argentina [ICSID 013] and accepted it later in LG&E v. Argentina [ICSID 021] in which, he also sat as an arbitrator. Furthermore, it is legitimate for a party to select an arbitrator based on his legal opinion or predisposition to favor its side of, such as by sharing the party's legal or cultural background or by holding doctrinal views that, by chance, coincide with a party's case. [Sam Luttrell, p.139].

56. Even when applying the IBA guidelines which are not applicable in this proceeding as mentioned above, this publication also does not constitute justifiable doubts as to Mr. Prasad's impartiality since previously expressed opinions fall under the green list of the IBA Guidelines: "*The arbitrator has previously expressed a legal opinion (such as in a law*

review article or public lecture) concerning an issue that also arises in the arbitration (but this opinion is not focused on the case." Such statements do not create a conflict of interest from an objective point of view. Also, the publication was available online and easily accessible either via all leading data bases publishing the Vindobona Journal or via Mr. Prasad's personal website [PO2, para. 14]. RESPONDENT should have checked the publications of Mr. Prasad before submitting its response and accepting his appointment by CLAIMANT.

57. Therefore, RESPONDENT's argument that Mr. Prasad's published opinion shows bias towards CLAIMANT fails to meet the threshold of disqualification and should therefore be dismissed.

B. Mr. Prasad's previous appointments are not grounds for disqualification

58. According to RESPONDENT, Mr. Prasad's repeat appointments by Mr. Fasttrack's law firm constitute justifiable doubts as to his impartiality pursuant to the IBA Guidelines [NoC, p.39, para.10]. By way of background, Mr. Prasad has been appointed only twice by Mr. Fasttrack's Law firm in the past two years. However, Mr. Fasttrack had no involvement in both cases [PO.2, p.51, para.9]. These circumstances were actually disclosed by Mr. Prasad in his declaration of independence and impartiality on 26 June 2017 [The Record, p.23, para.3]. RESPONDENT expressly accepted the appointment of Mr. Prasad despite the restrictions in his declaration of independence." [The Record, p. 26, para.22] Such acceptance without objection constitutes a waiver of RESPONDENT's right to challenge the arbitrator based on the disclosed facts. [Bader, p.46] Moreover, under Art. 13 of the UNCITRAL Rules, RESPONDENT lost his right to challenge the arbitrator on these grounds as it requires to send a notice within 15 days after it had become aware of these circumstances.

59. The IBA Guidelines, relied upon by RESPONDENT, further confirm RESPONDENT's waiver of any challenge on the disclosed facts once accepted or if no objection was made within 30 days from the date a party learns of the relevant facts or circumstances [IBA, GS 4, p. 9, para. (a)]. Moreover, even if such facts were not accepted by RESPONDENT – which is not the case, repeated appointments do not automatically create justifiable doubts. In fact, for such appointments to be relevant, they should demonstrate personal

or prior business contacts with the counsel on the case. However, Mr. Prasad was not appointed by Mr. Fasttrack himself as the latter was not involved in the previous cases [PO2, p.51, para.9]

60. Moreover, it is generally accepted that the mere existence of repeat appointments should not be enough to disqualify an arbitrator [Lew & Mistelis, paras. 11-27]. In fact, it is common that an arbitrator be appointed repeatedly by the same party or law firm. Parties tend to choose arbitrators who have proved to have the required qualities, including experience and work ethics in prior appointments [US Court of Appeals 1978; Born, p. 747]. In addition, the potential pool of arbitrators is not unlimited which makes the repeat appointment of arbitrator's indispensable [Maria & Timmins, p.105]. Repeat appointments could be a result of an arbitrator's independence and impartiality rather than an indication of justifiable doubts about it [Sheng & Koh, p.718].

61. In any case, the IBA Guidelines, consider that repeat appointments do not *per se* constitute justifiable doubts that would compromise an arbitrator's impartiality. In fact, the IBA Guidelines include the repeat appointments of an arbitrator by the same party more than twice within the past three years under the Orange List [IBA, Orange List, para. 3.1.3]. As previously mentioned in para.61 of this submission, the Orange List contains the events which should be disclosed by an arbitrator as these are likely to constitute doubts in the eyes of the Parties. However, the arbitrator's disclosure implies his impartiality and connotes their irrelevance for the required objective test of justifiable doubts. Mr. Prasad duly complied with his disclosure duties. However, the IBA Guidelines expressly consider that disclosure in this case does not "*by itself result either in a disqualification of the arbitrator, or in a presumption regarding disqualification*". The IBA Guidelines further assert that even "*if a party challenges the arbitrator, he or she can nevertheless act, if the authority that rules on the challenge decides that challenge does not meet the objective test for disqualification*." [IBA, part II, para. 4]

62. Thus, the repeat appointments of Mr. Prasad are not sufficient grounds to constitute justifiable doubts that would result in his challenge. In view of the above, and notably on RESPONDENT's waiver of the right to challenge Mr. Prasad on the ground of repeat

appointments, RESPONDENT's challenge should be dismissed.

C. Mr. Prasad's involvement as arbitrator in previous proceedings funded by subsidiaries of Findfunds do not compromise his impartiality

63. RESPONDENT contended that Mr. Prasad's alleged connection with CLAIMANT's third party funder Findfunds and CLAIMANT's efforts to conceal such connection constitute justifiable doubts as to Mr. Prasad's impartiality and independence, warranting his challenge [NoC, p.38, para.1]. However, RESPONDENT's assertion is incorrect and misleading. As a matter of fact, CLAIMANT's funder in these proceedings is Funding 12, which is a completely separate legal entity than Findfunds [The Record p. 43, para.3].

64. Likewise, the two previous arbitrations in which Mr. Prasad was an arbitrator were funded by two other subsidiaries of Findfunds and were both completed in August 2017 [The Record, p.36, paras 1&2]. Furthermore, none of these arbitrations involved the same parties or the same dispute. In addition, in one of these arbitrations, Mr. Prasad had been appointed as arbitrator before the funding agreement was signed. [The Record, p.36, paras. 1&2]As for the arbitration conducted by Mr. Prasad's partner, it was funded by Funding 8, which is also a separate entity from Funding 12, currently funding these proceedings. [PO2, p.50, para.6] In no instance, did any of these subsidiaries appoint Mr. Prasad [PO2, p.50, para.4].

65. As previously mentioned, in order to constitute justifiable doubts under Art. 12 of the UNCITRAL Rules a connection should be significant and direct, such as an economic relationship causing an arbitrator to be dependent on a party [ICSID 0319]. In the case at hand, in order to challenge Mr. Prasad, RESPONDENT should prove a significant and substantial financial connection between Mr. Prasad and Funding 12, which RESPONDENT failed to prove. Furthermore, according to RESPONDENT's allegations: *"one of Mr. Prasad's partners is acting for a client in an arbitration which is funded by Findfunds*" [NoC p. 39 para.11]. In fact, Funding 8 is funding the arbitration in which Mr. Prasad's partner is representing a client and not Findfunds LP [PO2, para.6]. It is important to stress that Funding 8 and Findfunds are two separate legal entities that could not be considered as the same THIRD -PARTY FUNDING [PO2, para.3].

66. In fact, the abovementioned arbitration has commenced before the merger of Mr. Prasad's law firm with Slowfood and is currently at its final stages [The Record, p. 36, para. 3]. Such

remote connection does not in any way, create, let alone suggest, any justifiable doubts as to Mr. Prasad's impartiality. In fact, there has been recently a large increase in the number of international mergers between law firms, which cannot prevent lawyers from acting as arbitrators in an arbitration in which they never represented one of the parties or received payments from them. In addition, Mr. Prasad has confirmed that all necessary precautions have been put in place to avoid any connection with the present dispute [The Record, p.36 para 3].

67. Additionally, in the aforementioned arbitration, Slowfood has charged 1.5 million USD on the case funded by Funding 8 which accounts for around 5% of the annual turn of Slowfood in each of the last two years before the merger [PO2, para.6]. However, after the merger, the 5% will decrease in accordance to the profits of Mr. Prasad and his partner who are both equity partners in the new firm. This amount is insignificant to assume that Mr. Prasad is getting a financial interest in the outcome of the arbitration.

68. Moreover, the third-party funding is not exclusive to Mr. Prasad, but actually funds all the arbitrators fees to the whole Tribunal and the arbitral proceedings in general. Thus there is no evidence that Mr. Prasad has a direct interest in the outcome of this arbitration [US Court of Appeals 1982]. Thus, RESPONDENT failed to prove a strong and financial interest that justifies a connection between Mr. Prasad and the current funder.

69. The IBA Guidelines, relied upon by RESPONDENT also confirm under GS 7 that a party shall inform the arbitral Tribunal of any relationship between the arbitrator and any person or entity "*with a **direct** economic interest in the award to be rendered in the arbitration*" [emphasis added] [IBA, GS 7, para (a)]. Indeed, as demonstrated above, there is no relationship between Mr. Prasad and Funding 12, the third-party funder in this case. This fact accentuates the absence of any financial interest of Mr. Prasad in the outcome of the case. Thus, RESPONDENT's allegations of the existence of a relationship between Mr. Prasad and Findfunds LP have no basis and do not constitute justifiable doubts as to his impartiality and independence since Funding 8 and Funding 12 are different legal entities and Findfunds has little influence on its subsidiaries regarding the arbitrator's appointment [PO2, p. 50 para. 4].

70. Finally, unlike what RESPONDENT is alleging, none of the circumstances relating to third-party funding falls under para 2.3.6 of the IBA Guidelines relating to the Waivable List. In

fact, it provides: *"the arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties."* However, Mr. Prasad's law firm has no commercial relationship with Mr. Fasttrack. As for the subsidiaries of Findfunds, none of these is actually a party to the proceedings within the meaning of para. 2.3.6 of the IBA Guidelines. In light of the above, RESPONDENT failed to prove that any of the circumstances would create justifiable doubts as to Mr. Prasad's impartiality and independence either under the UNCITRAL Rules or even under the IBA Guidelines. Therefore, RESPONDENT's challenge should be dismissed.

PART 3: CLAIMANT FULFILLED ITS OBLIGATION TO DELIVER CONFORMING GOODS UNDER CLAIMANT'S STANDARD CONDITIONS WHICH FORM PART OF THE CONTRACT

71. According to CLAIMANT's Standard Conditions, which form part of the contract under Art. 19 CISG (I), CLAIMANT's obligation to deliver conforming goods does not include any obligation to ensure that its suppliers complied with its Code of Conduct (II).

I. CLAIMANT's Standard Conditions govern the Contract according to Article 19 CISG

72. The CISG has specific provisions concerning the definition of an offer, counter-offer, acceptance and withdrawal (A). In this case, CLAIMANT's response to RESPONDENT's original tender materially modified that offer, thus amounting to a counter-offer (B) which RESPONDENT explicitly accepted without objection (C).

A. Under Article 19 of the CISG, an acceptance that modifies an offer is a rejection of the offer and is considered instead a counter-offer

73. The Parties stipulated that the Contract shall be governed by the CISG and for issues not dealt with the CISG the UNIDROIT Principles are applicable. [Exh. C-2, p.10, para.19].

74. Art. 19(1) of the CISG stipulates that *"a reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer."* Art. 19(3) adds that "*additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, […]are considered to alter the terms of the offer materially.*" Thus, any material modification to an original offer is considered a counter-offer [Oberster Gerichtshof 2000].

75. Art. 2.1.11 of the UNIDROIT confirms this principle, providing that in commercial dealings, an offeree who purports to accept an offer but includes additional or different material terms to the offer in fact makes a counter-offer that must then be accepted by the original offeror. The first offer is considered nonexistent and is replaced by the second offer [Schwenzer & Schlechtriem, p.359, para. 19].

76. To be considered a counter-offer, the reply to the offer must satisfy the requirements of Art. 14(1) the offeror must sufficiently indicate the quantity and the price of the goods in order to make a valid offer, and the acceptance of such an offer will result in an enforceable contract [OLG Frankfurt 1994]. The CISG Digest provides a list of modifications considered as material, including modifications related to the price, the payment method and the size of the goods [Schwenzer & Schlechtriem, p. 358, para.17].

B. CLAIMANT's response materially modified RESPONDENT's original tender, thus amounting to a counter-offer

77. On 10 March 2014, RESPONDENT sent a tender offer to numerous recipients including CLAIMANT and RESPONDENT requested in its offer the delivery of chocolate cakes, specified the price and quantity, and enclosed its Code of Conduct [Exh. C-8, p.20] CLAIMANT received this offer on the same day.

78. On 27 March 2014, CLAIMANT responded to the RESPONDENT's offer and made material modifications. In particular it changed the price per cake from 2.50 USD to 2 USD, the method of payment (requesting that payment be made within 30 days instead of 60 days), and the size of the order [Exh. C-3, p.15; Exh. C-4, p.16]. In addition, and this fact is at the heart of this case, CLAIMANT also included its own General Conditions of Sale, which differ from those originally proposed by RESPONDENT [Exh. C-4, p.16].

79. CLAIMANT's modification to the original offer are material, and thus CLAIAMANT's response constitutes a rejection of the initial offer. CLAIMANT made clear that its offer would be subject to the application of its own General Conditions of Sale, including its own Code of Conduct [Exh. C-4, p.16].

C. RESPONDENT explicitly accepted CLAIMANT's counter-offer as well as CLAIMANT's Standard Conditions

80. According to Art. 18 of the CISG, an acceptance is a declaration of intent that is not subject to any specific form to be valid. The acceptance should also reach the offeror for it to become effective. In other words, the offeree can accept an offer either by express declaration or by conduct; once accepted the contract is formed.

81. Thus, an acceptance of the counter-offer without objection results in the formation of the Contract that includes the counter-offer under Art. 18 of the CISG. This is confirmed in doctrine: *"it is clear that under Art.8, 18(1), (3) of the CISG, when liberally construed, any performance or preparation for performance by the (original) offeror could – when executed after the counter-offer has reached him/her – easily become a "trap" for the original offeror"* [Schwenzer & Schlechtriem, p. 360, para. 23]. Indeed, the prevailing offer is made by the offeror who had "the last word", also known as the "the last shot rule" [Kröll & Mistelis, p.290, para. 15].

82. On 7 April 2014, RESPONDENT informed CLAIMANT that its tender was successful, despite all changes, including the mode of payment, the size of the order and the inclusion of CLAIMANT' General Conditions. Thus, RESPONDENT expressly accepted the CLAIMANT's modifications by noting that "*we are pleased to inform you that your tender was successful notwithstanding the changes suggested by you*" [Exh. C-5, p.17, para.3]. In addition, RESPONDENT's acceptance of the first delivery on 1 May 2014 reinforced its clear intent to be bound by the terms of the Contract based on CLAIMANT's Counter-Offer [RNoA, p.25, para.13]. In fact, where Art. 19(1) applies, *"assent to the counter-offer will often be indicated by conduct*". [Schwenzer & Schlechtriem, p.360, para. 22; OLG Hamm].

83. In light of the above, CLAIMANT's General Conditions and its Suppliers Code of Conduct form part of the Contract and apply on CLAIMANT's obligations with respect to the conformity of the chocolate cakes.

II. CLAIMANT was not obligated to ensure that its suppliers comply with RESPONDENT's Code of Conduct

84. CLAIMANT's General Conditions and notably its Suppliers' Code of Conduct do not include any binding commitments towards RESPONDENT concerning the production process of the chocolate cakes (A), meaning that chocolate cakes containing non-sustainable cocoa beans are nonetheless conforming goods under the CISG and the contract (B).

A. CLAIMANT's General Conditions include no binding commitments towards RESPONDENT concerning the production process of the chocolate cakes

85. None of the clauses of CLAIMANT's General Conditions or Code of Conduct contain any obligation for CLAIMANT to ensure that its suppliers would comply with the provisions of its Code of Conduct. An interpretation of the terms of CLAIMANT's Suppliers Code of Conduct under the CISG confirms the absence of an obligation on the part of CLAIMANT in this respect. In fact, and as previously mentioned Art. 8(1) CISG provides that a statement made by a party should be interpreted according to its intent provided the other party knew or could not have been unaware what that intent was.

86. In fact, CLAIMANT's Code of Conduct expressly determines that its goal is merely to *"positively **influence** the supply chain"* [Emphasis added] by "*enabling and supporting suppliers to review their current approach to sustainability*." [Exh., R-3, p.31, para.2] Such statement merely contains an aspirational goal and do not contain an actual obligation. Hence, at no point did CLAIMANT guarantee that its suppliers would comply with its Code of Conduct and the relevant standards of environmentally friendly and sustainable production.

87. On the contrary, CLAIMANT"'s Code of Conduct expressly provides that it merely outlines *"the expectations we have of all our suppliers*." [*Ibid*.] Thus, CLAIMANT only expected that its suppliers to comply with its Code of Conduct. RESPONDENT, which confirmed to have downloaded and read CLAIMANT's Code of Conduct could not have been unaware of CLAIMANT's intention out of its Supplier's Code of Conduct [Exh. C-5, p.17, para.2], especially that the verb "expect" has been repeated four times therein. The verb expect clearly reflects an aspiration that is likely to happen without no firm

evidence or commitment. Therefore, CLAIMANT was at no point under the obligation to ensure that its suppliers would comply with its aspirational goals [NoA, p. 7, para. 20] and RESPONDENT could not have been unaware of such intention. Moreover, RESPONDENT even expressly confirmed that it does not impose any such obligation on its own suppliers but only *expects* such adherence**.** [Exh. C-2, p.13, the Preamble] Accordingly, CLAIMANT provided chocolates that conform with the Contract even if they contain non-sustainable cacao beans.

B. Chocolate cakes containing non-sustainable cocoa beans are nonetheless conforming goods under the CISG and the contract

88. As established above, CLAIMANT had no obligation regarding the production process of the cocoa beans, the production of the beans is not part of the conformity of the cakes. Instead, the conformity should be measured from the moment CLAIMANT received all its needed ingredients (as well as the cocoa beans) to start its production.

89. Consequently, relying on Art. 35 CISG, CLAIMANT delivered goods of the quantity, quality, and description required under the Contract (*"Chocolate Cake – Queens' Delight")* [Exh. C-4, p.16]. Even if the chocolate cakes contained non-sustainable cocoa beans, they are still conforming goods under the CISG and the Parties' contract. In fact, CLAIMANT's goods have been and continue to be conforming since the first delivery, *i.e*., for approximately 3 years.

90. However, assuming that RESPONDENT's Code of Conduct is part of the Contract, CLAIMANT would still have complied with its obligations thereunder and is still entitled to payment for the delivered goods.

PART 4: EVEN IF RESPONDENT'S CODE OF CONDUCT FOR SUPPLIERS APPLIES, CLAIMANT IS STILL ENTITLED TO BE PAID FOR THE GOODS DELIVERED UNDER THE CISG AND THE CONTRACT

91. CLAIMANT duly fulfilled its obligation of best efforts under RESPONDENT's Code of Conduct (I). CLAIMANT is entitled to payment for the delivered goods due to RESPONDENT's failure to fulfill its contractual obligations.(II)

I. CLAIMANT duly fulfilled its obligations under RESPONDENT's Code of Conduct for Suppliers, which is an obligation of best efforts

92. Assuming that RESPONDENT's General Conditions are part of the Contract and its Conduct for Suppliers is applicable, CLAIMANT is only required to use its best efforts in delivering the chocolate cakes (A), which CLAIMANT fulfilled and acted in good faith throughout the contract. (B) Even if the tribunal finds that the obligation is of result, CLAIMANT is still exempted from any liability pursuant to Art.79 (1) CISG(C).

A. RESPONDENT's Code of Conduct requires that CLAIMANT only use its best efforts in fulfilling the Contract

93. RESPONDENT's Code of Conduct for Suppliers, which is part of the General Conditions of Contract, imposes on CLAIMANT an obligation of best efforts under Art.8 CISG (1) and according to the principle of *contra proferentem* under Art. 4.6 UNIDROIT (2).

i. The interpretation of RESPONDENT's Code of Conduct under Art.8 of the CISG provides that CLAIMANT has an obligation of best efforts

94. RESPONDENT's Code of Conduct should not be interpreted to impose on CLAIMANT an obligation of result because CLAIMANT was unaware of such an intent (i). The Contract should be interpreted based on the understanding of a reasonable person in a similar situation as required by Art. 8(2) CISG, and pursuant to this interpretation, CLAIMANT is only obligated to use its best efforts (ii).

95. CLAIMANT could not have been aware of the RESPONDENT's intent to impose an obligation of result. In fact, RESPONDENT drafted its Code of Conduct for Suppliers and included it as part of the original offer. RESPONDENT argues that its Code of Conduct should be interpreted according to its subjective intent, meaning that CLAIMANT's obligation is one of result [RNoA, p.27, para.26]. According to Art. 8(1), the terms and provisions of a contract should be interpreted in accordance with the party that made the statement only when the other party knew the actual intent. [Schwenzer & Schlechtriem, p.147, para.6; U.S. Court of Appeals 1998]. CLAIMANT was unaware and could not have been aware of RESPONDENT's intent to impose an obligation of result regarding the CLAIMANT's suppliers of cocoa beans.

96. Art. 8(2) of the CISG provides that in the event Art. 8 (1) proves inapplicable, a party's

statement should *"be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances."* Furthermore, CLAIMANT's obligation of best efforts is based on the understanding of a reasonable person according to Art. 8(2) CISG. In fact, a reasonable person would have equally understood that its obligation towards its suppliers is a best effort obligation. In this respect. Thus, RESPONDENT's Code of Conduct is only interpreted according to Art. 8 (2) if a reasonable person in the same circumstances of CLAIMANT would have been aware that its obligation is one of result regarding the sustainability of the production process of the chocolate cakes. [Schwenzer & Schlechtriem, p.153, para.20; US District Court 2010; Kantonsgericht St. Gallen 2010).

97. RESPONDENT argued that its Code of Conduct requires CLAIMANT not only to comply with the values under the Code of Conduct but also to ensure compliance of its own suppliers with such principles, as is clearly stated in principles C and E. [RNoA, para.26, p.27]

98. However, none of the provisions of RESPONDENT's Code of Conduct imposes a result on CLAIMANT. The terms "ensure" and " make sure" used therein imply a best result obligation. RESPONDENT did not in any way mention in the Contract or in its Code of Conduct the result it awaits from CLAIMANT regarding the supplier of cocoa beans. A reasonable person in the same situation as CLAIMANT could understand from such terms that RESPONDENT's intention is merely to impose an obligation of best effort based on the unclear meaning of such terms regarding a definite and certain result awaited by RESPONDENT. RESPONDENT also mentioned in its Code of Conduct that CLAIMANT's suppliers have to agree to adhere to standards comparable to its standard conditions. [Exh. C-2, p.13] This means that RESPONDENT by using the term comparable in this context had the intention, as a reasonable person would understand to expect that CLAIMANT's suppliers do not adhere to its standard conditions but rather to similar ones.

99. Based on the above and unlike RESPONDENT's allegations, an interpretation under Art. 8 (2) can only lead to imposing an obligation of best effort upon CLAIMANT. Furthermore, since RESPONDENT was the one which drafted this Code of Conduct, the

principle of *contra proferentem* provided for under Art 4.6 of UNIDROIT would also apply and would entail interpretation of this clause against RESPONDENT's interest.

ii. The interpretation of RESPONDENT's Code of Conduct should be made according to the principle of *contra proferentem* under Art. 4.6 of UNIDROIT

100. Art.4.6 of UNIDROIT states that *"if contract terms supplied by one party are unclear, an interpretation against that party is preferred."* Thus, RESPONDENT should bear the consequences stemming from the ambiguity of the provisions in its Code of Conduct.

101. If the Tribunal considers that RESPONDENT's Code of Conduct is ambiguous, it should interpret this section in favor of CLAIMANT. In accordance with the rule of *proferentem,* which also applies under the CISG [Bundesgerichtshof 2014], the party that formulated or supplied a certain term must bear the risk of the term's ambiguity [Paris Court of Appeal 1988; OLG Stuttgart 2008]. Thus, the interpretation should not be according to the drafter's intention but according to other party's interest and understanding. And any doubts should be resolved against the drafter [Schwenzer & Schlechtriem, p.168, para. 49; U.S. Court of Appeals 2002; Del.Ch. 2012].

102. The ambiguity in the Code of Conduct stems solely from RESPONDENT's terms and expressions. Comparing principle C and E of RESPONDENT's Code of Conduct to Clause 4 of CLAIMANT's Code of Conduct, it is clear that CLAIMANT included a detailed provision regarding the compliance of its supplier with sustainable production. On the contrary, RESPONDENT did not expressly include such an obligation; it merely used the term "*ensure*" to refer to CLAIMANT's duty towards cocoa bean suppliers. RESPONDENT failed to mention in the contract and its Code of Conduct the result of nonperformance regarding a potentially unsustainable cocoa bean supplier. The verb "make sure" should be interpreted as a duty of best efforts since RESPONDENT's expectations were not clarified to as an obligation of result.

B. CLAIMANT performed its obligation of best efforts in delivering conforming cakes as required under the contract, and it acted in good faith throughout the Contract

103. As the CISG does not include any provisions on the nature of the parties' obligations, the UNIDROIT Principles apply as the alternative rule of law chosen by the parties [Exh. C-2; PO1, para. 3(4)]. CLAIMANT performed its best efforts obligation according to

Art.5.1.4 of UNIDROIT since the *"obligation of a party involves a duty of best efforts in the performance of an activity, that party is bound to make such efforts as would be made by a reasonable person of the same kind under the same circumstances."* . This principle has been recognized by numerous courts [Federal Court of Australia 2010]

104. CLAIMANT appointed the team of experts Egimus AG who gives a five-year-cycle of extensive audits and report about Ruritania Peoples Cocoa GmbH [PO2, para.32, p.53]. The expertise made by Egimus AG is valid: first, it "*was not involved in the corruption in Ruritania*" [PO2, p.54, para.33]. Second, as the report is made every five years, and knowing that the latest report was done in 2014, this report will be valid until 2019 [PO2, para.32, p.53]. It follows that CLAIMANT was not required to conduct further investigations before 2019.

105. Moreover, CLAIMANT performed its best efforts regarding its supplier of cocoa beans. RPC had a good reputation in the market as evidenced by two model farms it was operating in Ruritania, which demonstrated how cocoa beans can be produced in a sustainable way that protects the rainforest. [PO2, para. 32, p.53].

106. In addition, CLAIMANT is also a reputable company in the market, and is known for its first-rate supervision of its supply chain. Over the last five years, there have been no reported cases about a violation of the UN Global Compact Principles by CLAIMANT or any of its suppliers [PO2, para.34, and p.54].

107. After an initial visit to CLAIMANT's premises in summer 2014, and after watching a presentation CLAIMANT made about the steps taken to monitor the supply chain and examining monitoring documents, RESPONDENT decided to make no further audits or site visits [PO2, para.34, p.54].

108. Despite its best efforts in monitoring its supplier of cocoa beans, CLAIMANT at all times acted in good faith with respect to RESPONDENT. After finding out that RPC is involved in a fraudulent scheme, CLAIMANT immediately took necessary steps to ensure that RESPONDENT’s concerns were addressed [NoA, p.5, para. 9].

109. According to Art.1.7 of UNIDROIT Principles, "*each party must act in accordance with good faith and fair dealing in international trade. The parties may not exclude or limit this*

duty." Art.7 CISG also states that "*in the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."* [ICC No. 9875] In fact, and right after CLAIMANT investigated and discovered the fraud, it immediately terminated the contract with RPC. CLAIMANT also swiftly found another supplier to secure the continuity of delivery of goods to RESPONDENT in order for the latter not to be affected by the fraud [Exh. C-9, p.21, para.2].

110. Although not in breach of its obligations and as a token of good faith, CLAIMANT offered to RESPONDENT a reduction of 25% for the price of 600,000 cakes delivered and not yet paid by RESPONDENT. Consequently, even if RESPONDENT's Code of Conduct should apply, CLAIMANT still complied with its obligations and exerted its best efforts to ensure its suppliers compliance with the Code of Conduct.

C. Should the Tribunal find that CLAIMANT owed RESPONDENT an obligation of result according to RESPONDENT's Code of Conduct, CLAIMANT should nonetheless be exempt from liability pursuant to Art. 79(1) of the CISG

111. Even if CLAIMANT's obligation under RESPONDENT's Code of Conduct was of a result nature, CLAIMANT would be exempted from the liability under Art. 79(1) CISG since it could not have ensured such a result as it was out of its control. Art. 79 (1) provides that *"a party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences."*

112. In this case, the impediment is clearly outside the CLAIMANT's "sphere of control." "Only an impediment which lies outside of the promisor's sphere of control can lead to an exemption under Art. 79" [Schwenzer & Schlechtriem, p.1133, para.11]. CLAIMANT fell victim to fraudulent acts by the government of Ruritania and its officials. CLAIMANT could not have known or foreseen the illegal scheme run by the official government and resulting in falsified documents. The governmental acts were outside the CLAIMANT's control. In fact, *"in determining whether such a failure to perform by seller could be exempted under Art. 79 CISG, the Arbitrator found that the Romanian government's*

decision was beyond the seller's control and that it could not have been reasonably contemplated at the time of conclusion of the contract." [AAA Case]. While "financial difficulties" are considered to be within the sphere of responsibility of a party and thus fail to constitute an impediment beyond the party's control [Chinese Goods Case], CLAIMANT had no control over the acts of third, unrelated parties.

113. The fact that the entire State of Ruritania was corrupted and partaking in the fraud scheme is clearly beyond CLAIMANT's control. CLAIMANT cannot be expected to monitor the State and its entities for various reasons. Moreover, according to Art. 79(1) CISG, the impediment should not be reasonably expected to be avoided at the time of the conclusion of the contract. [U.S District Court 2004]. CLAIMANT used a third-party expert to monitor its supply chain and administer a survey to ensure that suppliers adhered to the production requirements at the time of the conclusion of the contract on April 7, 2014 [Exh. C-5, p.17].

114. CLAIMANT did everything possible at the time of the conclusion of the contract as the fraud in Ruritania was first made public on Equatoriana's state news channel on 19 January 2017, followed by an article in Equatoriana's leading business newspaper on 23 January 2017 [Exh. C-7, p.19], both of which took place years after the contract was concluded. Finally, CLAIMANT could not be reasonably expected to avoid the consequences stemming from the far-reaching government's illegality. [ICC No. 218y/2011].

II. In any case, RESPONDENT failed to fulfill its obligation of payment under Articles 53 and 59 of the CISG; therefore, CLAIMANT is entitled to payment for the delivered goods and to resulting damages

115. RESPONDENT misused the remedies available to it under the Contract should in the event of a breach (A), especially that the Contract provides for payment at a certain date (B). In all cases, RESPONDENT is still obligated to pay at a minimum for half of the goods seeing that only 50% of the cocoa beans came from illegally set up farms (C).

A. RESPONDENT's decision to withheld payment and terminate the Contract was not made in accordance with the CISG

116. To protect the rights of both parties, the CISG also requires the affected party to claim its rights by following specific formalities, one of which is giving notice to the seller before avoiding the contract. Art. 26 CISG states that *"[a] declaration of avoidance of the contract is effective only if made by notice to the other party"*. Regardless if the breach is fundamental, the buyer has to give the seller additional time for performance, and upon expiration of the given time, the contract is avoided. "*A party's right to avoid a contract will frequently be linked to the expiry of an additional time granted for performance under the nachfrist principle"* [Kröll&Mistelis, p.354, para. 6].

117. In this case, RESPONDENT declared that it will *"refrain from taking any further delivery or making any further payment until the issue is solved"* [Exh. C-6]. While RESPONDENT's notice may be in compliance with Art. 63(2) CISG, which states that *"*u*nless the seller has received a notice from the buyer that he will not perform within the period so fixed*."

118. Moreover, RESPONDENT's notice was not an avoidance notice because it demanded that CLAIMANT solves the issue regarding the supplier. CLAIMANT failure to solve the issues would have given RESPONDENT the right to avoid the Contract. However, CLAIMANT swiftly addressed all the concerns by immediately terminating the cocoa bean supply contract and by securing new suppliers to restart delivery [Exh. C-9, p.21]. Consequently, RESPONDENT cannot avoid the contract because the condition that was attached to potential avoidance was fulfilled. RESPONDENT failed to respect the formalities of a notice for avoidance set out by Art. 26.

B. According to Article 59 of the CISG, RESPONDENT must pay for the delivered goods on the date fixed by the contract.

119. According to Art. 59 CISG, *"[t]he buyer must pay the price on the date fixed by or determinable from the contract and this Convention without the need of any request or compliance with any formality on the part of seller".* Any late payment is a breach of contract, which triggers the legal penalties set out in Art. 61 CISG. This is in accordance with existing case law. For example, a German court *"held that in accordance with the provision of Art. 59 CISG the buyer must pay the price on the date fixed by the contract."* [Landgericht Aachen, 1990].

120. As mentioned above, both parties agreed on a method of payment by which RESPONDENT would pay for the goods 30 days after delivery. By refusing to pay for the cakes, RESPONDENT fundamentally breached the contract under Art. 59 CISG. Moreover, in its RNoA , by asking for a set off, RESPONDENT admits that CLAIMANT is entitled to payment. RESPONDENT specifically "*declares once more explicitly to set-off its existing damage claims against potential the payment claims of CLAIMANT"* [RNoA, para. 29, P.27]. The notion of set-off is controversial, with some authors arguing that it is not governed by CISG and others claiming that the CISG's general principle provide a sufficient basis for exercising the right to set-off where debts arise from the same contract. Furthermore, seeing that the CISG focuses on the principle of declarations extinguishing obligations, the party should send a notice to the other party for claiming a set-off. In this case, RESPONDENT failed to notify CLAIMANT concerning the set off, and even if RESPONDENT argues otherwise, an equal debt does not exist between both parties in the contract, seeing that no financial damages were suffered by RESPONDENT.

121. Even if the tribunal finds the goods nonconforming, RESPONDENT is still obligated to pay for the goods, at least for the cakes delivered before the discovery of the fraud rendering them nonconforming. In fact, RESPONDENT must pay CLAIMANT for at least one delivery, i.e., the December delivery [Art. 62 CISG]. Moreover, with respect to the cakes delivered during or after the alleged nonconformity was discovered by RESPONDENT, the latter still owes CLAIMANT payment as it not only consumed the goods, but it also made them part of a marketing strategy to attract more clients [PO2, p. 54, para. 38].

122. This conduct shows that the RESPONDENT acted in bad faith, and it should be barred from not paying for goods it actually profited from. Instead, the tribunal should order the RESPONDENT to pay of USD 1,200,000 for 600,000 cakes delivered.

C. Alternatively, even if RESPONDENT does not consider the chocolate cakes conforming, its obligation of payment still exists according to Article 53 of the CISG knowing that only 50% of the cocoa beans supplied to CLAIMANT came from illegally set up farms

123. Art. 53 CISG sets out a general provision regarding the buyer's obligation to pay for the goods delivered. As mentioned earlier, the buyer is obligated to pay the price of the delivered goods, otherwise the seller may resort to remedies set out in Art.62.

124. In this case, and according to the Procedural Order No. 2, 50% of the beans supplied by Ruritania Peoples Cocoa GmbH came from illegally set up farms. In other words, it is impossible to detect which cakes contained the affected beans and which cakes did not. Thus, even if RESPONDENT refuses to pay the full price for alleged nonconformity, it has to pay for at least half of the order that represents the 50% of the conforming cakes.

RELIEF SOUGHT

In light of the above, CLAIMANT seeks to obtain an award with the following prayers for relief:

1) A declaration that the Tribunal has no authority to rule on the challenge of Mr. Prasad under Art. 13 (4) of the UNCITRAL Rules;

2) Alternatively, an order to rule on the challenge with the participation of Mr. Prasad under Art. 13 of the Danubian Law and in this case, an award dismissing the challenge against Mr. Prasad under Art. 11 of the UNCITRAL Rules;

3) A declaration that CLAIMANT fulfilled its obligations relating to the delivery of conforming goods under Art. 35 of the CISG and is entitled to full payment for the delivered cakes under Art. 54 CISG for an amount of USD 1,200,000;

4) An award ordering RESPONDENT to pay damages as will be substantiated in the second round of submission as Procedural Order Number 1.

5) An award ordering RESPONDENT to pay the applicable interest for delays in paying the full Contract price under Art. 78 CISG; and

6) An award ordering RESPONDENT to bear all costs incurred by CLAIMANT pertaining to this arbitration including attorney fees.

Submitted on 7 December 2017

On Behalf of CLAIMANT